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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Association of American Railroads ("AAR") is a trade association representing major railroads in the United States. Its members account for approximately 77

[1] No person or entity other than the AAR, certain of its members and counsel have made monetary contributions toward this brief, and no counsel for any party played any role in the preparation of any part of the brief. AAR has filed with the Clerk of the Court the consent of counsel for Petitioners and Respondents to file this brief.

percent of the line haulage, employ 91 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It has previously filed *amicus curiae* briefs in cases before this Court that present issues of substantial importance to its members.[2] In the 1997 Term, AAR urged this Court to accept for review a petition presenting one of the issues presented by this case.[3]

The Petitioners here, successors to operators of uranium mines located on the Navajo Reservation, were sued in tribal court by members of the Navajo Nation alleging injury caused by exposure to radioactive wastes. The Atomic Energy Act, as amended, broadly regulates the field of nuclear power.[4] The Act also creates a federal cause of action and gives defendants the absolute right to have such claims adjudicated in federal court by mandating removal from state court at the defendant's request. 42 U.S.C. § 2210(n)(2). Despite these features of the statutory scheme, the Ninth Circuit ordered Petitioners to exhaust tribal remedies before challenging tribal jurisdiction in federal court on the ground of federal preemption.

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[2] *See Burlington Northern R.R. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, No. 91-545 (filed Nov. 1, 1991); *Southern Pacific Transportation Co. v. Jose Hernandez*, No. 91-293 (filed Sept. 18, 1991); *Transportes Aeros Mercantiles Pan Americanos, S.A. v. International Association of Machinists & Aerospace Workers*, No. 91-02 (filed Aug. 30, 1991); *Norfolk & Western Ry. v. Olen Roberson*, No. 90-1271 (filed Apr. 19, 1991); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See* Brief *Amicus Curiae* of the Association of American Railroads in Support of the Petition, *Kerr-McGee Corp. v. Farley*, No. 97-705 (filed Dec. 22, 1997).

[4] *See, e.g., Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 854 (3d Cir. 1991).

AAR has a strong interest in this case because the Ninth Circuit's decision, though addressing a dispute involving nuclear power, has serious implications for the nation's railroads. That decision applies the doctrine of exhaustion of tribal remedies inflexibly, requiring resort to tribal courts even when the controlling issue is whether a scheme of federal regulation displaces tribal adjudicatory power. Like the nuclear power industry, railroads are subject to comprehensive federal regulation which displaces tribal authority to regulate their operations. The Ninth Circuit's misguided extension of this Court's prior precedents will subject the railroads to time-consuming, burdensome and needless litigation in the tribal courts.

The impact of the court of appeals' "strict view" of exhaustion doctrine is striking. While the litigation is pending, the entity subject to federal regulation typically is exposed to local (*i.e.* tribal) regulation. This is precisely the danger against which federal preemption doctrine was designed to protect. The regulated entity also incurs the cost of litigating the case on its merits, despite the possibility, indeed in many cases the likelihood, that the entire proceeding may ultimately be found void by a federal court. And it runs the risk of a huge verdict at the hands of a jury composed solely of tribal members. *See, e.g., Burlington Northern Railroad v. Red Wolf*, 106 F.3d 868, 869 (9th Cir. 1996) (requiring exhaustion of tribal remedies following $250 million tribal jury verdict arising from grade crossing accident), *cert. granted & decision vacated*, 118 S. Ct. 37 (1997). It is little consolation to those who have suffered these costs that the tribal court judgment may ultimately be set aside as void for lack of jurisdiction, since they then face the prospect of the litigation beginning anew in another forum.

The operational and legal risks associated with a denial of access to the federal courts are particularly severe for the nation's railroads. Railroads are tempting targets for tribal regulation, taxation, and civil liability claims.[5]

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[5] As this Court noted in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994), railroads " 'are

Pursuant to federal rights of way, one or more railroads cross the lands of at least 55 reservations in 16 states. This century-old configuration is not likely to change, since a large number of rights of way carry main rail lines that cannot be abandoned.

AAR members have already seen a number of attempts by tribes to engage in improper regulation of their operations on reservation lands. For example, *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), dealt with a Crow Tribal Common Carrier Ordinance adopted in 1982 which estabilshed "general duties" of "railroad lines" operating on the tribe's reservation. It authorized tribal regulation of health and safety, service and facilities, and abandonment, all of which are addressed by federal regulatory law.[6] *Id.* at 1241. In 1996, the Bad River Band of the Lake Superior Tribe of Chippewa Indians enacted a "Railroad Safety Ordinance." This ordinance purported to regulate, among other things, the track to be used on reservation lands and the "qualifications" of railroad personnel on trains crossing the reservation, notwithstanding that the Federal Railway Safety Act ("FRSA") and regulations promulgated thereunder regulate track safety and operation[7] and the "licensing or certification" of locomotive engineers.[8]

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easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." (Quoting *Western Air Lines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 131 (1987).).

[6] *See* 49 U.S.C. § 20142 (safety); § 10501(b)(1) (service and facilities); § 10903 (abandonment).

[7] *See* 49 U.S.C. § 20142; 49 C.F.R. §§ 213.31-.37 (track roadbeds), 213.51-.63 (track geometry), 213.101-.143 (track structure).

[8] *See* 49 C.F.R. §§ 240.1-.411 (1997).

These examples of tribal efforts to regulate railroads underscore the seriousness of this issue for the railroad industry. Tribal regulation—like state and local regulation—contravenes the congressional policy calling for "national uniformity" in the regulation of railroads.[9] Railroads need speedy, unimpeded access to federal courts to determine the scope of federal preemption and the consequent limitations on tribal jurisdiction.

SUMMARY OF ARGUMENT

The Ninth Circuit held that a federal court presented with a challenge to tribal court jurisdiction may consider in the first instance claims of federal preemption only where a federal statute expressly forbids tribal court jurisdiction. In reaching that result, the court failed to accord any weight to countervailing interests favoring the immediate exercise of jurisdiction by the federal courts with respect to issues of federal preemption.

This mechanical approach ignores the underpinnings of the tribal exhaustion doctrine. Exhaustion, this Court explained in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), is based on comity, and is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)." 480 U.S. at 16 n.8. Flexibility is a defining characteristic of *Colorado River* abstention and comity analysis. These doctrines permit courts to weigh the interest in having a federal court render a prompt decision on an issue of federal law, such as preemption by a comprehensive regulatory scheme. They also permit courts to consider the interest in avoiding piecemeal litigation, so that the parties are not forced to shuttle from court to court in order to get a definitive answer. This Court's prior decisions do not preclude a federal court from initially addressing preemption by a federal regulatory statute.

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[9] 49 U.S.C. § 20106.

Issues of preemption—whether express or implied—may have a direct impact on the scope of tribal court jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court reiterated that, as a "general proposition," the inherent sovereignty of the Indian tribes does not "extend to the activities of nonmembers of the tribe." 520 U.S. at 445-46; *accord Montana v. United States*, 450 U.S. 544, 565 (1981). Rather, such powers lie only to the extent they have been affirmatively granted by Congress.[10] Since tribal adjudicatory jurisdiction reaches no further than its regulatory jurisdiction, *Strate*, 520 U.S. at 453, tribal court jurisdiction does not extend to matters over which the tribe lacks regulatory power as a result of federal preemption.

Federal preemption may be implied as well as express. In either case, there are sound reasons to permit a federal court to consider such claims. For example, in *Strate*, this Court unanimously directed federal courts to consider claims that tribal courts lacked jurisdiction with respect to incidents occurring on rights of way granted by federal statute. In that instance, there is no express prohibition on tribal court jurisdiction, but the relevant questions of statutory interpretation can be readily addressed by the federal courts. Thus, the Court concluded that "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14.

The policies on which this Court's exhaustion precedents rest—the benefits of permitting tribal courts to

[10] *See Strate*, 520 U.S. at 445 ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."); *Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (argument that tribes may exercise jurisdiction over nonmembers "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' ").

examine and document the basis in tribal law for their own jurisdiction—do not support exhaustion where a regulated entity raises a preemption claim based on a comprehensive federal scheme. In these cases, the dispositive issue will finally turn on a federal court's interpretation of the scope of federal law and not on any interpretation of tribal law. Yet litigants required to try and appeal such cases in the tribal court system will be forced to incur unnecessary regulatory and litigation costs, as well as delay, before obtaining an authoritative resolution in federal court.

The interpretation of this Court's precedents adopted by the Ninth Circuit and other courts over the last decade is misguided. It has resulted in an overt refusal to consider, let alone properly balance, the substantial countervailing federal interests inherent in federal regulation of specific industries. This Court should hold that the federal courts must address issues of federal preemption without requiring that tribal remedies first be exhausted.

ARGUMENT

I. EXHAUSTION OF TRIBAL REMEDIES IS NOT AN UNYIELDING REQUIREMENT

In the decision below, the Ninth Circuit insisted that exhaustion was required in the absence of an express jurisdictional prohibition in a federal statute or treaty. "Price-Anderson," the court found, "contains no such express prohibition of tribal court jurisdiction." Pet. App. at 13a. The court of appeals then ordered exhaustion of tribal remedies without even considering the countervailing federal interests in bringing order and uniformity to the area of nuclear torts. *See* Pet. App. at 17a-19a. In another recent case involving the same regulatory scheme, the Tenth Circuit, having similarly failed to find an express prohibition of tribal jurisdiction, refused to take such federal interests into account. The Tenth Circuit stated affirmatively that the "*National Farmers* framework

does not accord countervailing federal concerns a place in the comity analysis." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1508 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998).[11] This mechanistic approach to exhaustion analysis lacks support in either the genesis of the exhaustion doctrine or this Court's precedents.

A. Exhaustion Analysis Properly Takes Into Account Countervailing Federal Interests

The doctrine of exhaustion of tribal remedies, as articulated by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), owes its origins to preexisting prudential concerns that have traditionally guided the federal courts in exercising their jurisdiction. As the Court explained in *Iowa Mutual*, "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)." 480 U.S. at 16 n.8.

Colorado River abstention is a flexible concept requiring a balancing of interests. It allocates responsibility for initial adjudication on the basis of both the expertise and role of a particular court system and an overall interest in efficiency. In *Colorado River*, the Court began with the premise that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado*

[11] Other courts have also required exhaustion of tribal remedies even when a federal regulatory scheme strongly implies that federal jurisdiction is exclusive. *See, e.g., Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir. 1996) (exhaustion mandatory because federal statute apparently preempting tribal tax on telephone lines on reservation did not expressly divest tribal court of jurisdiction); *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("exhaustion of tribal remedies is not discretionary; it is mandatory").

River, 424 U.S. at 813. In light of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Id.* at 813 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1921) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

The Court then identified some of the specific circumstances in which abstention had been viewed as appropriate, such as where "a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law," or where a case presented "difficult questions of state law bearing on policy problems of substantial public import." 424 U.S. at 814. The Court recognized that abstention might also be appropriate when justified by "consideration of '[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.* at 817 (citation omitted). This kind of abstention comes into play only when duplicative actions, involving the same parties and the same issues, are pending in the federal and state systems.

A number of factors guide application of *Colorado River* abstention, including the importance of avoiding piecemeal litigation, whether the merits of the dispute turn on the resolution of a federal question, and the adequacy of the fora to protect the parties' rights. *Id.* at 818; *Moses H. Cone Memorial Hosp. Co. v. Mercury Constr. Co.*, 460 U.S. 1, 23 (1983). *Colorado River* abstention does not require federal courts to ignore the federal interest in having federal courts decide questions

of federal law. Nor does it require them to ignore the burdens that may be imposed upon litigants by shuffling them between courts. Rather, *Colorado River* requires an intelligent weighing of the interests present in a particular procedural situation.

The analogy to *Colorado River* is particularly significant in the context of a case involving federal preemption issues. Where Congress has enacted legislation that is preemptive of state or local law, it has recognized a federal interest sufficiently important to override state and local autonomy. That federal interest must be taken into account in balancing the need for federal court action.

Comity, the other concept to which the Court has referred as a basis for tribal court exhaustion, is similarly flexible. The very definition of comity implies discretion: "[a] willingness to grant a privilege, not as a matter of right, but out of deference and good will." [12] As between sovereign nations, comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987). Moreover, the forum court must consider its own interests as well as those of the other state in determining whether to exercise jurisdiction. *Id.* § 403(3). Thus, under a traditional comity analysis, the federal interest in having a federal court decide the preemptive scope of federal law is a legitimate factor which should be considered.

Finally, to the extent that the tribal exhaustion doctrine has roots in the concept of exhaustion of administrative

[12] Black's Law Dictionary 266 (5th ed. 1998).

remedies, that doctrine, too, permits a flexible approach. Exhaustion of administrative remedies "protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise and correct its own errors"; "aids judicial review by allowing the parties and the agency to develop the facts of the case in the agency proceeding"; and "promotes judicial economy by avoiding needless repetition of administrative and judicial fact-finding, perhaps avoiding the necessity of any judicial involvement." Bernard Schwartz, ADMINISTRATIVE LAW 542 (3d ed. 1991). These purposes are echoed in *National Farmers'* explanation of the purposes of requiring tribal exhaustion. *See* 471 U.S. at 856-57.

But, again, exhaustion of administrative remedies is not required as a matter of course. Rather, in the administrative law context as well, the interests favoring exhaustion are to be weighed against countervailing interests:

> [T]his Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in obtaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.

McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

It is thus plain that flexibility is an essential characteristic of the various doctrines behind the concept of tribal court exhaustion. These doctrines recognize the obligation of a federal court to accept jurisdiction, declare the boundaries of federal law, and save litigants the expense of unnecessary litigation.

B. The Ninth Circuit's Strict View of the Exhaustion Doctrine Is Not Supported by This Court's Precedents

In fashioning the concept of trial court exhaustion from these pre-existing doctrines, this Court did not adopt an inflexible rule. "[E]xhaustion is not an unyielding requirement." *Strate*, 420 U.S. at 449 n.7. Rather it is a "prudential" doctrine, adopted "in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'" *Id.* at 450 (quoting *National Farmers Union*, 471 U.S. at 857). While the Court in its early cases required exhaustion for a determination of the reach of the tribal court under tribal law and applicable federal treaties, none of its precedents have held that a question of federal preemption must be presented first in tribal court. On the contrary, there are substantial indications in this Court's precedents that such issues of federal law are appropriately considered by the federal courts without exhaustion.

The exhaustion doctrine originated in *National Farmers Union*, a personal injury case arising from a motorcycle accident in a school parking lot. The jurisdictional question was whether the tribal court had authority over the school district. Federal preemption was not at issue, as there was no claim that a specific or comprehensive federal regulatory scheme precluded adjudication of the tort case in tribal court. This Court concluded that "considerations of comity" required exhaustion. *See Iowa Mutual*, 480 U.S. at 15 (explaining *National Farmers Union*). These considerations included "tribal self-government and self-determination" and fostering "the orderly administration of justice in the federal court" based on the development of a full record in the tribal court. *National Farmers Union*, 471 U.S. at 856-57. The Court explained that exhaustion would "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of

further judicial review." *Id.* at 857. Thus, the Court held that, in a "case of this kind," the examination of the scope of tribal sovereignty "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856.

In *Iowa Mutual*, this Court followed much the same analysis in considering whether the federal courts should adjudicate an insurance coverage dispute that was also pending in tribal court. The courts below had dismissed the claims to permit tribal exhaustion. This Court affirmed, but not without first giving extensive consideration to the Petitioners' argument that tribal court jurisdiction was impliedly prohibited by the federal diversity statute. This Court resolved that question of federal law on its merits, holding that "[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts," the Court would not find a limitation on tribal sovereignty. 480 U.S. at 18. Significantly, the Court did not require that the implied prohibition issue itself be addressed in the first instance by the tribal court.

Most recently, in *Strate* this Court reviewed its exhaustion cases in considerable detail. It reiterated that the analysis is a "'prudential rule' . . . based on comity." 520 U.S. at 448, 453, 449 n.7. It noted that tribal court jurisdiction over non-Indians in criminal cases is "categorically restricted" and hence not subject to exhaustion, but that exhaustion is appropriate in civil matters where "'the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.'" *Id.* at 449 (quoting 471 U.S. at 855-56).

In *Strate* itself, the Court found that where a nonmember of the tribe was proceeding through the reservation on a right-of-way granted by a federal statute, 25

U.S.C. §§ 323-28 (1994), the tribe had lost its "gatekeeping right," 520 U.S. at 455, so that the rights of the nonmember would be governed by the rule of *Montana v. United States*, 450 U.S. 544. "Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 453 (quoting *Montana*, 450 U.S. at 565). The Court examined each of those exceptions and found that neither was satisfied by a tort case against a nonmember arising from an accident on the right-of-way.

Although *Strate* arose after full litigation in the tribal courts, the Court's unanimous opinion dealt in a categorical fashion with the issue of exhaustion in future cases. Where, as in *Strate*, the case arose on a federal right-of-way and it was "plain that no federal grant provides for tribal governance of nonmembers' conduct," then it would be "equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." 520 U.S. at 459 n.14. In this situation, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* at 459-60 n.14.

Strate thus indicates that when the issue of tribal court jurisdiction turns purely on questions of federal statutory law—the existence of a federal right-of-way and the absence of an express grant of power to the tribe—exhaustion of tribal remedies is not required.[13] There was no

[13] The Ninth Circuit panel responsible for the *El Paso* decision had great difficulty in assimilating the *Strate* decision. Initially, it rigidly concluded that there were only three "exceptions" to the exhaustion doctrine. Pet. App. at 25a. On rehearing, it amended its opinion to add a fourth exception. *Id.* What the panel failed to recognize is that the rule announced in *Strate* was simply another practical application of the flexible doctrine announced in this Court's earlier cases.

need for an individual federal district court to consider tribal interests potentially implicated by the two "exceptions" to the general rule of *Montana*, since the Court had already considered them itself and found them insufficient to justify jurisdiction in a tort case. Because the only questions remaining were purely questions of federal statutory law, the Court found tribal court exhaustion unnecessary and, in fact, harmful.

In summary, neither the antecedents of the tribal exhaustion doctrine nor this Court's precedents support the strict view applied by the court below. A court engaged in analysis of comity should consider the federal interest in obtaining a federal court interpretation of a potentially preemptive federal statute, as well as the interest of a regulated entity in a prompt and efficient resolution of the controversy. At the same time, a federal court should also consider, as this Court did in *Strate*, whether prior consideration by a tribal court would add anything except delay to analysis of the federal question.

II. FEDERAL COURTS SHOULD CONSIDER CLAIMS OF IMPLIED PREEMPTION OF TRIBAL COURT JURISDICTION WITHOUT REQUIRING EXHAUSTION

Under a flexible exhaustion analysis, the scope of initial federal court review cannot be limited to situations in which there is an express jurisdictional prohibition. Federal law may deprive tribal courts of jurisdiction through regulatory preemption as well as express jurisdictional limitation. Such preemption may take any one of a number of forms: comprehensive federal regulation occupying the field, a federal statute specifying an exclusive remedy, or a federal statutory scheme implicitly creating a conflict with local regulation. In any of these circumstances, tribal courts will lack jurisdiction over nonmembers. Moreover, in each of these circumstances, the question of tribal court jurisdiction will turn on the scope of a federal statute

that has nothing to do with Indian affairs. Thus, whether the preemption is explicit or implicit, the policies favoring a prompt federal decision on the scope of federal preemption will be equally strong, and will be compelling in relation to any reasons for exhaustion of tribal court remedies.

A. Federal Regulatory Preemption May Deprive Tribal Courts of Jurisdiction

In insisting on an express jurisdictional limitation, the court below failed to appreciate the impact of federal preemption on the scope of tribal court jurisdiction. Where a federal statutory scheme—whether through its express provisions or its implied effect—preempts tribal regulation, it also deprives the tribal courts of the power to adjudicate the rights of nonmembers. Thus, tribal court jurisdiction will often turn on a precise analysis of the scope of a federal scheme.

A starting point for any determination of the scope of tribal court jurisdiction over a nonmember is the presumption declared in *Montana* and reaffirmed in *Strate*: "In the main, . . . 'the inherent sovereign powers of an Indian tribe' . . . 'do not extend to the activities of nonmembers of the tribe.'" *Strate*, 520 U.S. at 445-46 (citations omitted); *Montana*, 450 U.S. at 565. This limitation "'rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*.'" *Montana*, 450 U.S. at 564 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (alteration in original)). The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* Thus, Indian tribes have been implicitly divested of their

sovereignty in areas "involving *the relations between an Indian tribe and nonmembers of the tribe.*" *Id.* (citation omitted; emphasis in original).

This presumption may be overcome in limited circumstances. When a tribe owns the land and has retained a landowner's "gatekeeping right" to control entry onto the land, that tribe "retain[s] considerable control over nonmember conduct." *Strate*, 520 U.S. at 454. But if the tribe no longer owns the land or, as in *Strate*, has otherwise given up a landowner's power to exclude nonmembers from the land, the tribe ordinarily will have no basis for regulating the conduct of a nonmember. *Strate*, 520 U.S. at 453; *Bourland*, 508 U.S. at 689, 691 n.11.

Where the tribe has no power to regulate the conduct of a nonmember, it also lacks authority to bring that nonmember before a tribal court to adjudicate claims against him. This is a central holding of *Strate*. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. The Court emphasized, "Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding." *Id.* Thus, in that case, because the Tribes had surrendered their power to regulate conduct on the federally granted right-of-way, they had also lost the power to adjudicate claims against nonmembers arising from their conduct on the right-of-way.

This removal of the Tribes' regulatory power occurred, not by express jurisdictional prohibition, but by implication from a federal statute depriving the Tribes of their power to regulate. And a tribe may also lose its power to regulate, for example, as a result of a federal regulatory scheme that provides an exclusive remedy,[14] occupies

[14] *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 43-47 (1987) (complexity of statutory scheme confirms that Congress intended remedies provided in Employee Retirement Income Security Act of 1974 to be exclusive); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (same).

the field,[15] or creates a practical conflict with local tribal law.[16]

In fact, this Court has held that tribal jurisdiction may be removed by implication. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court determined that tribal courts lack jurisdiction to try non-Indians for criminal offenses, despite the absence of an express prohibition:

> While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

435 U.S. at 204; *see also National Farmers Union*, 471 U.S. at 854-55 (*Oliphant* held that "federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had *implicitly pre-empted* tribal jurisdiction") (emphasis added).

Whether federal law removes tribal regulatory power through explicit or implicit preemption, the effect on tribal court jurisdiction should be the same. The absence of regulatory jurisdiction over a nonmember necessarily must result in the absence of adjudicatory power. Thus, in a case where federal preemption is asserted, the pivotal question is not the scope of the tribe's jurisdiction under

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[15] *See, e.g., California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) ("[C]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (citation omitted); *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566, 568 (1919).

[16] *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

its constitution, laws and treaties, but rather the interpretation of federal law.

B. Federal Courts Should Determine Implied Preemption Issues Without Requiring Exhaustion of Tribal Court Remedies

As footnote 14 of the *Strate* opinion illustrates, federal courts need not limit their role in determining tribal court jurisdiction to cases of express prohibition. Where there is a viable claim that a federal statute preempts tribal regulatory power, the policies favoring an immediate decision outweigh the interests in tribal court exhaustion. In fact, the same factors that support tribal court exhaustion in the context of a personal injury or contract case, like *National Farmers Union* or *Iowa Mutual*, argue for a prompt and definitive federal court decision in the context of a challenge based on federal regulatory preemption.

In that circumstance, it is not the *tribe's* asserted basis for jurisdiction that is in issue, but rather the scope of the *federal* scheme—the intent of Congress—that is dispositive. The provisions of these federal regulatory schemes are routinely addressed by federal courts, whereas tribal courts encounter them infrequently, if at all. Moreover, as the case before the Court demonstrates, analysis of a claim of implied preemption of tribal court jurisdiction calls for an analysis of a federal statute and Congress's intent, rather than tribal law, and rarely requires an extensive factual record. If the federal scheme fully occupies the field or specifies an exclusive remedy, "the precise basis" for tribal court jurisdiction will be largely irrelevant. Thus, the federal policies that underlay this Court's prior decisions are not served by requiring exhaustion where preemption is asserted.

Nor is referral of such matters to tribal courts consistent with the orderly administration of justice. It makes no sense that, while the federal courts may assume jurisdic-

tion immediately to hear claims of express prohibition of tribal jurisdiction, they should withhold their expertise resolving claims of implied preemption until after full adjudication on the merits in tribal court. Moreover, requiring exhaustion in these circumstances forces litigants to shuffle between tribal and federal courts: first to federal court to determine whether there is an express prohibition, then (if the court rules there is not) to tribal court to consider whether there is an implied prohibition, then back to federal court for a definitive ruling. Such a scheme is hugely wasteful of the resources of both court systems, as well as the time and assets of the litigants. The approach of the court below to preemption is *dis*orderly—a formula for unending, multi-court litigation.

Even the policies supporting tribal autonomy are implicated to a lesser degree when the decisive questions are the scope and intent of a federal regulatory scheme rather than identification of the limits of tribal sovereignty. Those questions are issues on which federal courts will obviously have the last word. A dry run of these issues in tribal court seems pointless and ultimately corrosive of true tribal court autonomy.[17]

If the pertinent federal policies are candidly assessed, it is difficult to see why issues of express prohibition of tribal court jurisdiction should be heard immediately by federal courts, while questions of implied preemption should be deferred until after tribal adjudication on the

[17] As one commentator explained:

> [A]llowing the tribal court to take "first crack" at issues that involve no question of tribal law serves no policy of the exhaustion doctrine . . . . Though interpretation of state and federal law is certainly within the purview of tribal court jurisdiction, the tribal court can claim no particular or unique expertise in these areas.

Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089, 1139 (1995).

merits. In either case, it is the federal court's assessment of the scope of federal preemption that will be determinative of the outcome. If the issues are somewhat more subtle in a case of implied preemption, this is a sound reason to draw on the experience and expertise of the federal court. Moreover, in contrast to statutes that specifically prohibit tribal court jurisdiction, comprehensive federal schemes are not likely to be rooted in the history of federal-tribal relations, but rather in the history of federal regulation of a particular industry or field. Thus, there is no reasonable basis in the policies underlying abstention for holding that federal courts can immediately consider claims of express prohibition, but must defer on claims of implied preemption.

An inflexible exhaustion requirement undermines the legitimate interests of nonmembers arising under federal law. Where the dispositive ruling ultimately will come from the federal courts on an issue of federal law, it is burdensome for nonmembers to be forced to litigate the case to finality in the tribal courts before seeking a dispositive federal ruling. With federally-regulated entities, such as railroads, the impact of a court's refusal to entertain a valid federal question pending resolution in tribal court may be inconsistent with the congressional intent underlying the federal scheme at issue. Congress's purpose in broad, preemptive regulation is usually to promote uniformity and consistency in areas in which Congress perceives an important federal interest.[18] The inflexible application of exhaustion of tribal remedies, notwithstanding a colorable preemption claim, ignores these federal

[18] *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-302 (1988) (Natural Gas Act of 1988 reflects Congress' intent to create a "comprehensive scheme of federal regulation" in natural gas industry); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (under Ports and Waterways Safety Act of 1972 "Congress intended [to establish] uniform national standards for design and

interests and undermines the uniformity and consistency those statutes are meant to promote.

The nation's railroads are particularly concerned with the lower courts' refusal to consider countervailing interests in exhaustion analysis. Tribal regulation of the safety of railroad operations raises obvious preemption issues under the Federal Railroad Safety Act ("FRSA"), as amended. 49 U.S.C. §§ 20101-20153 (1994). Section 20106 of the FRSA expressly preempts state regulation of areas regulated federally, and the federal courts have given a broad interpretation to the scope of such preemption.[19] Because of the context in which it was written, however, this statute does not expressly refer to tribal law or jurisdiction. Railroads should not be compelled to adjudicate the merits of tribal enforcement of tribal railroad safety ordinances when the controlling question is the preemptive scope of the federal statute.

Similarly, the ICC Termination Act of 1995 ("ICCTA") vests "exclusive jurisdiction" in the Surface Transportation Board over the "services and facilities" of railroads, declares "the remedies provided under" the statute to be "exclusive," and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C.A. § 10501 (b)(2) (1997). While this statute does not expressly

construction" of tanker vessels); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) (federal interest in foreign affairs and uniform naturalization preempted Pennsylvania statute requiring registration of alien residents in the state).

[19] *See, e.g., Burlington Northern R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989) (FRSA preempts state caboose law since regulations promulgated under that statute permit "the use of end-of-train telemetry devices as substitutes for visual brakes inspection"); *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (same); *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) ("virtually all state regulations affecting the train itself appear preempted by federal law").

refer to tribes or tribal remedies, its pre-emptive intent is clear. Once again, it would be pointless to spend years litigating the scope of that preemption through several layers of tribal courts when the final answer will be provided by a federal court that has the analytical tools fully available to it. However, the sweeping exhaustion theory followed by the court below—which accords no weight to the federal interests at all—threatens to eliminate any timely opportunity for railroads to seek federal protection from unauthorized and inappropriate tribal regulations.

CONCLUSION

The Court should reverse the decision of the court of appeals and hold that a federal court must address issues of federal preemption, whether express or implied, without requiring that tribal remedies first be exhausted.

Respectfully submitted,

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